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No. _____

In the

Supreme Court of the United States

October Term, 1999

BOSS CAPITAL, INC,

Petitioner,

vs.

CITY OF CASSELBERRY,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the United States Court of Appeals for the Eleventh Circuit improperly consider and determine a claim over which it had no jurisdiction because of a lack of standing?

II. When the government enacts a prior restraint on free speech, does a provision allowing immediate access to the courts following denial of a permit satisfy the requirement of prompt judicial review, mandated by *Freedman v. Maryland* and *FW/PBS, Inc v. City of Dallas*?

PARTIES

The Petitioner is Boss Capital, Inc., a Florida corporation, the plaintiff in the District Court and the appellant in the Court of Appeals. Boss Capital has no parent corporation or subsidiaries.

The Respondent is the City of Casselberry, a Florida municipal corporation, the defendant in the District Court and the Appellee in the Circuit Court.

All parties to the proceedings below are parties to this Petition.

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In the

Supreme Court of the United States
October Term, 1999

BOSS CAPITAL, INC.

Petitioner,

vs.

CITY OF CASSELBERRY,

Respondent.

Petitioner respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Eleventh Circuit in *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999)..

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 187 F.3d 1251, and is reproduced at Appendix A to this petition. The unreported opinion of the United States District Court for the Middle District of Florida is reproduced at Appendix C.

JURISDICTION

The Court of Appeals entered its judgment on September 3, 1999. Petitioner timely filed its Petition for Rehearing, which was denied on October 18, 1999. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States of America provides that "Congress shall make no law . . . abridging the freedom of speech . . . .

STATUTES INVOLVED

The City of Casselberry regulates adult entertainment businesses through a comprehensive zoning and licensing code. The provisions of that Code pertinent to this Petition are reproduced in the Appendix to the opinion of the United States Court of Appeals for the Eleventh Circuit, and can be found on pages 12a through 18a of the Appendix to this Petition.

STATEMENT OF THE CASE

Boss Capital obtained a business location in the City of Casselberry for the purpose of opening and operating an adult nightclub. [Appendix A, at 2a]. There were three such businesses already operating in the City. [*Id.*, at 4a]. However, the City had enacted a comprehensive adult entertainment zoning and licensing ordinance. Boss Capital claimed the regulation was so restrictive that it prohibited any new adult nightclubs from opening. In fact, each of the three existing night clubs was a nonconforming use, and were allowed to continue in operation only because they were in business before the restrictive zoning provisions were enacted. [*Id.*, at 7a].

The City claimed that there were two locations that met the distance requirements in the zoning ordinance for adult entertainment businesses, in addition to the three existing businesses. [*Id.*, at 4a]. The City further argued that the existence of locations in the City was not critical to the case, because there were three adult nightclubs operating within a short distance from the City limits. [*Id.*] Therefore, the City argued that Casselberry need not allow any new adult entertainment businesses. [*Id.*]

The lawsuit originated with the filing of a complaint in the Middle District of Florida. Jurisdiction was based on 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331 and 1343. Boss Capital challenged the zoning and licensing regulations, claiming that they violated the First Amendment's guarantee of the right to free expression. [*Id.*, at 2a-3a]. As to the zoning provisions, Boss Capital argued that it was prohibited from opening anywhere in the City by the setback requirements in the ordinance. Boss Capital challenged the licensing provisions on the basis that they failed to provide the procedural safeguards mandated by this Court in *Freedman v. Maryland*, 380 U.S. 51 (1965) and *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990).

On May 13, 1998 the District Court granted the City's Motion for Summary Judgment, upholding both the zoning and licensing provisions. The court did not reach the issue of whether the two locations in the City were "available" for adult entertainment businesses, because it found the market for this entertainment program generally unrestricted. [App. C, at 28a-30a]. It based this finding on language of this Court in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) that suggested – but did not hold – that a *countywide* ordinance restricting locations of live entertainment might be constitutional even if it prohibited live entertainment in one or more municipalities in

the county. [*Id.*].[1] The District Court concluded that the existence of three nightclubs in the City and three more within a reasonable distance met the constitutional requirement imposed by the First Amendment.

The District Court also upheld the licensing sections of the ordinance, finding that they complied with both *Freedman* and *FW/PBS*. The ordinance included a provision allowing an unsuccessful applicant to immediately file suit in state court challenging the denial of the application. The District Court expressly held that under *FW/PBS* the First Amendment only requires that judicial review be promptly available, not that the review include prompt judicial disposition. [*Id.*, at 35a-37a].

Boss Capital filed its appeal to the Eleventh Circuit. That Court vacated the District Court's judgment on the zoning challenge. It held that the District Court must first determine whether the two sites in the City met the distance requirements, as the City had claimed. [App. A, at 6a] If so, the panel suggested that four or five sites in the City probably met the requirements of the First Amendment. [*Id.*]

The Eleventh Circuit then upheld the licensing provisions.[2] It said that *Freedman* only requires prompt judicial review through disposition in censorship cases, not in licensing

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[1] There is no countywide zoning in Seminole County, the county in which Casselberry is located.

[2] At oral argument, counsel for Boss Capital told the panel that if it did not strike down the zoning restrictions, Boss Capital lacked standing to challenge the licensing code.

cases. [*Id.*, at 13a].[3] In its decision, the panel noted an obviously irreconcilable split among the circuits on this point. [*Id.*, at 9a-10a].

On September 24th Boss Capital timely filed its Petition for Rehearing. In that Petition it argued that since the panel had not struck the zoning provisions, it should not have reached the issue of the constitutionality of the licensing sections. That claim was based on the fact that if the zoning provisions were valid, there is no party in the world that could benefit from a favorable decision on the licensing challenge. The three businesses in the City already had licenses, and neither Boss Capital nor anyone else had a location for which a new license application could be filed.

On October 18th, the Eleventh Circuit denied the Petition for Rehearing without opinion. [App. B].[4]

REASONS FOR GRANTING THE WRIT

This Court should issue its writ of certiorari because the Eleventh Circuit panel's decision to consider and rule on the licensing challenge has significantly altered the requirement that a federal court may not consider a claim absent a case or controversy. This basic constitutional rule of standing, rigidly adhered to by the federal courts, says that a party who cannot obtain any relief from a successful attack on a statute or ordinance has no standing to challenge it. Even in cases

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[3] The Circuit Court did not explain why denial of a license, which acts as a total prohibition of speech, is not a form of censorship.

[4] The Court did not require the City to file a response to Boss Capital's Petition.

brought to vindicate rights under the First Amendment, when the traditional rules of standing are somewhat relaxed, this Court has *always* required that there be *some* party that could benefit in some way from a successful challenge to the restriction. As a result of the panel decision, there is no longer a requirement in the Eleventh Circuit that some person have an interest in the outcome of litigation before suit is filed.

There is a second, equally compelling reason for this Court to issue a writ of certiorari. If Boss Capital had the requisite standing to challenge the City's licensing ordinance, this Court should issue the writ to resolve a serious and significant conflict among the circuit courts on a critical issue of constitutional importance: the requirement that any prior restraint of free speech include the availability for prompt judicial review. The split is so serious and so significant that the several circuits that have ruled on the issue have been unable to determine with certainty what the other circuits have held. As a further consequence of the split, district courts in circuits that have not passed on the question are reaching conflicting results.

I. In deciding a major issue in this case even though no person had any interest in the outcome, the Circuit Court refused to follow this Court's decision in *FW/PBS, Inc. v. City of Dallas*.

Unless this Court issues its writ of certiorari, a litigant in the Eleventh Circuit will no longer be required to have

standing to challenge a licensing ordinance regulating First Amendment activities. In effect, the Eleventh Circuit panel has said that any party can challenge a licensing ordinance, whether or not that party can ever obtain a license, and whether or not a successful challenge could ever benefit anyone! This is directly contrary to this Court's decision in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), and is a departure from well-established rules of standing that could open the federal courts to litigation for litigation's sake:

> The federal courts are under an independent obligation to examine their own jurisdiction, and standing "is perhaps the most important of [the jurisdictional] doctrines." *Allen v. Wright*, 468 U.S. 737, 750 (1984).
>
> *FW/PBS*, 493 U.S. at 231.

In *FW/PBS*, suit was brought to challenge zoning and licensing provisions of a Dallas ordinance regulating adult entertainment businesses. *Dumas v. City of Dallas*, 648 F. Supp. 1061 (N.D. Tex. 1986). The district court upheld most of the ordinance, and the Fifth Circuit generally affirmed. *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988). This Court granted review.

In the principal portion of the Court's opinion, the Court found the licensing sections of the ordinance to be an unconstitutional prior restraint of free speech. However, and

critical to this Petition, another part of the Court's opinion dealt directly with the jurisdictional issue of standing to challenge some of the ordinance's provisions. And the Court stated very clearly that when it does not appear affirmatively on the record that some party has an interest in the outcome of a challenge to a particular claim, the federal courts cannot entertain that challenge.

The Dallas ordinance included a provision that a person was not eligible to receive a license if he or she were living with another person who had had a license denied or revoked. Another provision disqualified persons who had been convicted or certain enumerated offenses. The lower courts had upheld both provisions.

This Court conducted the required examination of the record, consistent with its constitutional duty, to determine whether the two provisions were properly before the federal courts:

> First, the record does not reveal that any party before us was living with an individual whose license application was denied or whose license was revoked. Therefore, no party has standing with respect to § 41A-5(a)(5). Second, § 41A-5(a)(10) applies to applicants whose spouses have been convicted of any of the enumerated crimes, but the record reveals only one individual who could be disabled

> under this provision. An individual, who had been convicted under the Texas Controlled Substances Act, asserts that his wife was interested in opening a sexually oriented business. But the wife, although an officer of petitioner Bi-Ti Enterprises, Inc., is not an applicant for a license or a party to this action. See 12 Record, Evert Affidavit 3-6. Cf. *Bender*, 475 U.S., at 548, and n. 9, 106 S.Ct., at 1335, and n. 9.
>
> Even if the wife did have standing, her claim would now be moot. Her husband's convictions under the Texas Controlled Substances Act would not now disable her from obtaining a license to operate a sexually oriented business, because the city council, following the District Court's decision, deleted the provision disabling those with convictions under the Texas Controlled Substances Act or Dangerous Drugs Act. App.H. to Pet. for Cert. in No. 87-2012, p. 107. *See Hall v. Beals*, 396 U.S. 45, 48 (1969).
>
> 493 U.S. at 233-34.

This Court held that the challenges to these provisions should not be allowed:

> Examination of the record here reveals that no party has standing to challenge the provision involving those residing with individuals whose licenses were denied or revoked. Nor does any party have standing to challenge the civil disability provision disabling applicants who were either convicted of the specified offenses or whose spouses were convicted.
>
> 493 U.S. at 233.

In *FW/PBS*, there may well have been persons who had the requisite standing. It is not at all unlikely that some person in Dallas interested in obtaining an adult entertainment license had been convicted of one of the listed offenses. It is equally likely that there was a person who was disqualified because he or she was living with another disqualified person. But there was no such person as a party to the case, nor did the record reveal demonstrate that such a person actually, as opposed to theoretically, exist![5] Even in a case raising significant First Amendment issues, this Court still demanded that the record reveal some actual person with an interest in the outcome of the case.

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[5] Even a concession by the City at oral argument that some of the parties actually had been disqualified by the challenged provisions was insufficient to demonstrate standing. 493 U.S. at 235.

In the instant case, the situation is far worse than that in *FW/PBS*. In that case, everyone – including this Court – recognized that there may well be persons who would meet the standing requirement. In this case, the record clearly shows that there is no person *in the world* that could meet the test.

First, there are only three adult entertainment businesses in the City, and those businesses all have licenses. *Boss Capital*, App. 4a. Unless there are other locations in the City where one may apply for a license, there are no persons who would have any interest in the outcome of the licensing challenge. And the record in this case *does not affirmatively establish* that there are any other locations in the City for adult entertainment businesses. *Mansfield C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884); *FW/PBS*, 493 U.S. at 231.

After finding that no party had standing to challenge the disqualification provisions of the Dallas ordinance – even in a representative capacity often recognized in First Amendment cases – this Court vacated that portion of the Fifth Circuit opinion, and remanded those issues to the Court of Appeals with instructions that they be dismissed. The Court should do the same in this case. The licensing provisions should not have been considered by the Eleventh Circuit panel.[6] That portion of the panel decision should be vacated, and the Eleventh Circuit should be instructed to dismiss that portion of the appeal.

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[6] The District Court should not have ruled on the licensing provisions once it ruled that the zoning restrictions were valid. It should have dismissed those claims.

II. There is a serious conflict among the circuits as to the requirement of "prompt judicial review."

In 1965, this Court decided the landmark case of *Freedman v. Maryland*, 380 U.S. 51 (1965). The case involved a state scheme which required movie exhibitors to submit every film to a review board in order to obtain a license for showing the film in the state. The Court held that whenever the government imposes a prior restraint on free speech through a permit scheme, that scheme must contain three procedural safeguards. One of those safeguards requires the availability of prompt judicial review if a license is denied. 380 U.S. at 59. *See also, FW/PBS*, 493 U.S. at 228 (" . . . there must be the possibility of prompt judicial review in the event that the license is erroneously denied . . . .").

In *Freedman* the Court made it clear that the term "prompt judicial review" meant more than prompt access to the judicial system. The Court talked about prompt judicial review *through disposition of the prior restraint claim*:

> . . . Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. Moreover, we are well aware that, even after expiration of a temporary restraint, an administrative refusal to license, signifying

> the censor's view that the film is unprotected, may have a discouraging effect on the exhibitor. *See Bantam Books, Inc. v. Sullivan, supra.* Therefore, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.
>
> *Id.*

That phrase – prompt judicial review – so clearly defined in *Freedman* and subsequent cases, is no longer so clear. As the Eleventh Circuit panel noted, there is a serious split among the circuits as to just what that phrase means after this Court's decision in *FW/PBS*. That split must be resolved by this Court.[7]

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[7] The problem is not limited to adult entertainment cases. The Second Circuit recently stated that even when a permit is denied for a public rally in a public park, a traditional public forum, prompt judicial access is all that is required. If the review process takes so long that the public issue speech is forever denied because of the topicality of the subject, that is unfortunate but not unconstitutional, said the Second Circuit. *Beal v. Stern*, 184 F.3d 117, 129 (2nd Cir. 1999) (". . . prompt access to judicial review in state courts would satisfy *Freedman*, and there is some evidence in the record that such access is available."). Thus, the confusion about what is meant by prompt judicial review threatens core political

In *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993) (*en banc*), *cert. denied*, 511 U.S. 1085 (1994), five judges said that a permitting ordinance that provides for judicial review by writ of common law certiorari is all that is required under *Freedman*, and that access to the courts, not final judicial determination, is all the First Amendment requires. However, five judges disagreed, and two judges expressed no opinion. Therefore, there was no holding on this point.[8]

Then the Fourth Circuit decided *11126 Baltimore Blvd., Inc. v. Prince George's County*, 58 F.3d 988 (3rd Cir. 1995)(*en banc*), *cert. denied*, 516 U.S. 1010 (1995). That Court took an entirely different position on the term "prompt judicial review," and provided a critical analysis of *Graff*:

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speech, the type of speech that occupies the "highest rung of the hierarchy of First Amendment values," and is entitled to special protection. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Carey v. Brown*, 447 U.S. 455, 467 (1980).

[8] The fact that this was not a holding in *Graff* did not prevent a 3-judge panel in a later Seventh Circuit case to say: "The opportunity to apply for that writ [of common-law certiorari] is enough, *we have held*, even when rights under the first amendment are at stake. *Graff v. Chicago*, 9 F.3d 1309, 1323-25 (7th Cir. 1993)(en banc)." *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 167 (7th Cir. 1994)(emphasis added).

Graff was an en banc decision of the Seventh Circuit in which twelve judges participated. The appeal produced a badly divided court, much like *FW/PBS* itself. In addressing the argument that a Chicago licensing scheme for newsstands did not provide "prompt judicial review," the "principal opinion" authored by Judge Manion concluded that although the Chicago scheme did not itself provide for judicial review, judicial review of the licensing decision was available through a common-law writ of certiorari. Although Judge Manion's opinion apparently concludes that this review is adequate to satisfy the "prompt judicial review" requirement, it does not discuss whether the procedures available for a common-law writ require a prompt judicial decision. And, of critical importance, only five judges (including Judge Manion) joined this principal opinion . . . Therefore, Judge Manion's opinion is not a majority opinion of the Seventh Circuit. Interestingly, the seven judges who wrote to concur in the judgment or dissent all indicated their disagreement with Judge Manion's conclusion that the mere availability of judicial review satisfied the prompt judicial review requirement. Thus, the *Graff*

> decision does not hold that the prompt judicial review requirement is satisfied when judicial review is merely available.
>
> 58 F.3d at 1004, n.17.

The division among the circuits has grown considerable since *Graff* and *11126 Baltimore Blvd.*. It was expressly recognized by the panel in this case:

> This difference between Justice O'Connor's and Justice Brennan's characterizations of the right to prompt judicial review has spawned a split in the circuits. The First, Fifth and Seventh Circuits hold that for licensing ordinances, prompt judicial review only means access to prompt judicial review. *See TK's Video, Inc. v. Denton County*, 24 F.3d 705, 709 (5th Cir.1994), followed in *Grand Brittain, Inc. v. City of Amarillo*, 27 F.3d 1068, 1070-71 (5th Cir.1994) (per curiam); *Graff v. City of Chicago*, 9 F.3d 1309, 1324-25 (7th Cir.1993) (en banc); *Jews for Jesus, Inc. v. Mass. Bay Transp. Auth.*, 984 F.2d 1319, 1327 (1st Cir.1993). On the other side are the Fourth and Ninth Circuits and arguably the Sixth, which hold that *Freedman* and *FW/PBS* require a guarantee of prompt judicial resolution. *See Baby Tam & Co. v.*

> *City of Las Vegas*, 154 F.3d 1097, 1101-02 (9th Cir.1998), followed in *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108 (9th Cir.1999); *11126 Baltimore Boulevard, Inc. v. Prince George's County*, 58 F.3d 988, 998- 1001 (4th Cir.1995) (en banc); *cf. East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 224-25 (6th Cir.1995) (state certiorari procedures an insufficient guarantee of prompt judicial review).
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> App. A at 7a-8a.

Of interest, the different circuits are not even sure of what the other circuits are holding on this very important issue of First Amendment jurisprudence! As noted above, one panel in the Seventh Circuit said that *Graff* stands for the proposition that prompt judicial access is sufficient under *Freedman*. *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 167 (7th Cir. 1994) The Fourth Circuit took another view of *Graff* in *11126 Baltimore Blvd.* According to the Ninth Circuit in *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir.1998), and the Sixth Circuit in *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 224-25 (6th Cir.1995), the Eleventh Circuit, in *Redner v. Dean*, 29 F.3d 1495 (11th Cir.1994), had sided with the Fourth Circuit's position. The panel in this case said that *Redner* didn't decide the question at all! App. A, at 6a. In this case the panel said the law in the Eleventh Circuit –

the Circuit with the First,[9] Second,[10] Fifth[11] and Seventh Circuits[12] and in conflict with the Fourth,[13] Sixth[14] and Ninth Circuits[15] – is that *Freedman* is satisfied when a licensing ordinance provides prompt judicial access to the courts after denial of a license. Whether that review is prompt is constitutionally irrelevant.

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[9] *Jews for Jesus, Inc. v. Mass. Bay Trans. Auth.*, 984 F.2d 1319 (1st Cir. 1993).

[10] *Beal v. Stern*, 184 F.3d 117 (2nd Cir. 1999).

[11] *TK's Video, Inc. v. Denton County*, 24 F.3d 705, 709 (5th Cir.1994), followed in *Grand Brittain, Inc. v. City of Amarillo*, 27 F.3d 1068, 1070-71 (5th Cir.1994) (per curiam)

[12] *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993), *cert. denied*, 511 U.S. 1085 (1994).

[13] *11126 Baltimore Blvd., Inc. v. Prince George's County*; 58 F.3d 988 (4th Cir. 1995)(en banc), *cert.* denied, 516 U.S. 1010 (1995); *Chesapeake B & M, Inc. v. Harford County, Md.*, 58 F.3d 1005 (4th Cir. 1995), *cert. denied*, 516 U.S. 1010 (1995).

[14] *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220 (6th Cir. 1995).

[15] *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir. 1998); *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108 (9th Cir.1999)

The split among the circuits is causing inconsistency in decisions of the district courts in circuits that have not yet ruled on the issue. For example, in *Books, Inc. v. Pottawattamie County*, 978 F. Supp. 1247 (S.D. Iowa 1997) the district court adopted the same position as the district court in this case:

> It is not clear what, if anything, the *FW/PBS* Court meant by including the requirement of "prompt judicial review" in a municipal ordinance. The Eighth Circuit Court of Appeals has not interpreted this requirement. Other circuits appear split on whether the Court meant to require a "prompt judicial determination." *See 11126 Baltimore Blvd., Inc. v. Prince George's County*, 58 F.3d 988 (4th Cir.1995); *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220 (6th Cir.1995); *TK's Video, Inc. v. Denton County*, 24 F.3d 705 (5th Cir.1994); *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir.1993); *Jews for Jesus, Inc. v. Massachusetts Bay Trans. Auth.*, 984 F.2d 1319 (1st Cir.1993). This court finds those courts' reasoning which would require a county to attempt the impossible, namely forcing a state or federal court to decide, to be unreasonable and unpersuasive.
>
> 978 F. Supp. at 1255, fn. 7.

In *Franken Equities, L.L.C. v. City of Evanston*, 967 F. Supp. 1233 (D. Wyoming 1997) that district court took the exact opposite position. The court noted the conflict between the circuits:

> Since the *FW/PBS* decision, at least two courts of appeals concluded that prompt access to the courts did not satisfy the prompt judicial review requirement. Instead, these courts determined that prompt adjudication is required. *See East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 224-25 (6th Cir.1995); *11126 Baltimore v. Prince George's County, Maryland*, 58 F.3d 988, 998-1001 (4th Cir.1995). Other courts of appeals found that prompt access to the courts satisfies the prompt judicial review requirement. *See Graff v. Chicago*, 9 F.3d 1309, 1324-25 (7th Cir.1993) (en banc); *TK's Video v. Denton County*, 24 F.3d 705, 709 (5th Cir.1994); *Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth.*, 984 F.2d 1319, 1327 (1st Cir.1993).
>
> 967 F. Supp. at 1238-39.

The court then said: "[T]he Court concludes that the prompt judicial review requirement mandates prompt judicial resolution rather than mere access to the courts within a brief period." 967

F. Supp. at 1239. The court added:

> If a party is granted immediate access to the state courts upon an adverse administrative ruling, but the state courts, often with elected judges, are given no deadline for rendering decisions, protected speech is necessarily abridged pending final judicial resolution.
>
> *Id.*

No one could disagree with Boss Capital's claim that this issue has so divided the circuits that there is no consistent principle of law applicable to the fifty states. Citizens in some states have greater constitutional protection for their right to free speech (of all types) than citizens of other states. The circuit courts are divided; the district courts are divided; and the situation is so muddled that the circuits cannot even determine what each other has held. This situation cries out for resolution by this Court.

CONCLUSION

As argued herein, this Court should grant this Petition, vacate that portion of the panel opinion upholding the Casselberry licensing ordinance, and remand to the Eleventh Circuit with instructions to dismiss that portion of the appeal. Otherwise, the constitutional requirement that a litigant possess standing as an irreducible requirement of bringing suit will no

longer apply in the Eleventh Circuit. Anyone with a desire to challenge a licensing ordinance can do so.

However, if the Court, after a *de novo* review, finds that Boss Capital had the requisite standing to bring its licensing challenge to the Eleventh Circuit, the Court should grant the Petition to resolve the horrible conflict among the circuits on the issue of prompt judicial review. Vital First Amendment interests are at stake here, and as argued herein, *all* speech in those circuits applying the "prompt judicial access" approach is at risk, from sexually oriented speech at the "outer perimeters of the First Amendment," *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565 (1991) to core political speech, described by this Court as the very essence of self-government.[16] *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). As Judge Ripple wrote in his concurring opinion in *Graff*, discussing the prompt judicial review issue:

> The significant number of opinions already filed in this case would, under most circumstances, be a substantial disincentive to another contribution by a single member

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[16] Boss Capital cannot overemphasize that this case involves a serious threat to all speech requiring a license. While some would question the value of Boss Capital's entertainment as speech, no one argues with the value of core political speech. In the Eleventh Circuit, speech that is unpopular with the government is now at significant risk, even in a traditional public forum.

> of the court. The eyes of the bench and bar, and certainly those of the Justices of the Supreme Court of the United States who will undoubtedly be asked to review our work, are a fragile national resource. Under the unique circumstances presented here, however, an addition to the dialogue is justified because this case presents a most difficult problem for the court, a problem that, in the final analysis, can only be resolved by additional guidance from the Supreme Court of the United States. Under such circumstances, we have an obligation to examine thoroughly the matter while it is before us.
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> *Graff v. City of Chicago*, 9 F.3d at 1333

For the foregoing reasons, Boss Capital, Inc. respectfully petitions this Honorable Court for a Writ of Certiorari.

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